United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1083

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

V.

JCSEPH GAMBINO,

Appellant.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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ISSUE PRESENTED

1. The Appellant's motion pursuant to 28 U.S.C. §2255 should have been granted in the interest of justice.

PRELIMINARY STATEMENT

Appellant, Joseph Gambino ("Gambino") was indicted, on June 1, 1972, in a one count indictment for violation of Title 18 U.S.C. §911, namely, making a false personation of United States citizenship to an F.B.I. Agent on June 7, 1967.

Appellant was found guilty after a trial before the Hon. Charles H. Tenney and a jury. He was sentenced to a one-year suspended sentence and a fine of $750.00.

Appellant's conviction was upheld by the United States Court of Appeals for the 2nd Circuit and the petition for a writ of certiorari was denied by the United States Supreme Court. On October 24, 1974, the appellant filed a Notice of Motion pursuant to 28 U.S.C. §2255. On January 30, 1975, the United States District Court (Chas. H. Tenney, U.S.D.J.) denied this motion.

STATEMENT OF FACTS

The factual circumstances of this case are clear and uncomplicated. On June 7, 1967, F.B.I. Agent Edwin Taylor ("Taylor"), pursuant to his official duties in conducting an investigation of the private garbage collection industry in Westchester County, New York, and specifically of Bronx River Haulage Company, interviewed appellant, who was employed as a manager by one James Plastina. The latter, as the owner of a garbage transfer station in Mount Vernon, had personal contacts with the management of Bronx River Haulage.

During the course of this interview, appellant stated, among other things, in response to Taylor's inquiries, that he was born in Palermo, Sicily, on December 24, 1932; that he entered the United States through New York City in 1954; that he was married to Frances Gambino, whose maiden name was Costello; that he had no relatives in the United States; and that he became a United States citizen in 1960.

Not one of the above statements made was true. It is the last statement, namely, a false personation of appellant's United States citizenship, that constituted the crime charged in the indictment.

The true facts of appellant's pedigree and history are as follows: Appellant was born on January 20, 1930; he married Prudence Castelli eight days after the interview with Taylor and Frances Gambino was his mother; he entered the United States through Norfolk, Virginia; and he was not, nor

is he now, a citizen of the United States, a fact stipulated at trial.

The crux of appellant's defense adduced through his testimony at the trial, was that he had difficulty with the English language and did not willfully make such false statements.

ARGUMENT

THE APPELLANT'S MOTION PURSUANT TO 28 U.S.C. §2255 SHOULD HAVE BEEN GRANTED IN THE INTEREST OF JUSTICE

Although the grounds for a motion pursuant to 28 U.S.C. §2255 are limited, this Court, in considering this appeal, should keep in mind the issues raised in the appellant's past conviction appeal to this Court:

1. A new trial on the grounds of newly discovered evidence;
2. a prejudicial pre-arrest delay; and
3. sufficiency of the evidence.

While we are aware that these matters have already been presented to this Court and have no direct bearing on the present appeal, the facts and circumstances herein indicate that they should be kept in mind in this matter. The appellant was initially convicted for violating 18 U.S.C. §911 which states that:

> Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined not more than $1,000 or imprisoned not more than 3 years, or both.

We submit that in light of the facts and circumstances, and the changing opinion of the law, the judgement of conviction (5a) should be vacated. The Courts in numerous circuits have recognized that statutes such as 18 U.S.C. 1001 must be carefully and judiciouslyapplied. United States v. Ehrlichman, et al, CR No. 74-116 (D.C.D.C., July 22, 1974; Gesell, D.J.). Such statutes and other similar enactments of Congress make it a felony to falsely report various items or to make a false statement

to certain parties. Such statutes are often unclear and easily misinterpreted by the unwary. We submit that in a case such as the present one where the appellant is an Italian immigrant with a clearly demonstrable deficiency in the English language, the rigid enforcement of such a statute becomes onerous and highly prejudicial. When unsworn and informal statements are used as the basis of criminal punishment, such authority must be clearly authorized, and such authorization will not be found on a mere literal interpretation of the statute. Friedman v. United States, 374 F.2d 363 (8th Cir., 1967). The damage caused by such a literal reading is eminently clear in the instant situation. It can readily be seen that a person with a clear command of the English language would find little justification in violating the statute and could not feign inadvertance or ignorance. However, when a case such as the present one arises, the rigid application of the law must give way to practical considerations and the nature of the circumstances involved.

Statutory interpretation is obviously within the province of the Courts. However, a particular act may be within the letter of the Statute, and yet not a violation of that law as not within the spirit of legislative interest. United States v. 21 Pounds, 8 ounces of Platinum, 147 F.2d 78 (4th Cir., 1945); see also: National Labor Relations Board v. Griswold Manufacturing Co., 106 F.2d 713 (3rd Cir., 1939); Harris v. United States, 215 F.2d 69 (4th Cir., 1954). We submit that it was not the

intention of Congress to entrap an immigrant, unversed in English, and thus actually discriminate against him by virtue of this unfamiliarity with the English tongue. Departure from the letter of the law is justified when adherence to the strict language would cause an absurdity so gross as to shock the general moral or common sense, and when it is plain that Congress intended that the letter of statute was not to prevail. Busse v. C.I.R., 479 F.2d 1147 (7th Cir., 1973). In applying 18 U.S.C. §911 to the appellant, the mandate of the Busse case is clearly violated.

As to 18 U.S.C. §911 itself, we submit that appellant's conviction flies in the face of due process conscionability and basic fairness. The circumstances surrounding the alleged change were vague and uncertain, and to punish the appellant for what was apparently a misunderstanding, is basically unfair. To justify a conviction under this statute, there must be a direct representation by the accused that he is a citizen of the United States. United States v. Anzalone, 197 F.2d 714 (3rd Cir., 1952).

The essential point of the appellant's argument is naturally based on Judge Gesell's opinion in United States v. Ehrlichman, supra. Judge Gesell expressed a growing apprehension among the Courts to frown upon conviction for "violations". Under a similar situation and statute (18 U.S.C. §1001), Judge Gesell stated:

> In short, the F.B.I. interview may occur - as it did here - under extremely informal circumstances which do not sufficiently alert the person interviewed to the danger that false statements may lead to a felony conviction. (10a)

Additionally, Judge Gesell even more clearly expressed the growing fears of federal jurists as to such statutes:

> "The principle difficulty with invoking §1001 to punish those who lie to the F.B.I. when there is no legal obligation to respond to it is that the prosecution can thereafter demand sanctions as onerous as those imposed by the general perjury statute, 18 U.S.C. §1621, without affording those suspected of criminal conduct with any of the safeguards normally provided under that statute. There is no materiality, and no guarantee that the proceeding will be transcribed or reduced to Memorandum. See Marzani v. United States, 168 F.2d 133 (D.C. Cir.) aff'd, 335 U.S. 895 (1948)."

When one considers the informality with which the appellant was interviewed (i.e., at his place of business while working at his job), Judge Gesell's words are even more striking.

To require the appellant to bear the stigman of a felony conviction for an unintentional and inadvertent misstatement flies in the face of every sense of justice and fairness.

CONCLUSION

WHEREFORE, it is respectfully requested that this Court reverse the Order of Judge Tenney and vacate appellant's conviction.

Respectfully submitted,

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